

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SINGH v MINISTER FOR IMMIGRATION &
ANOR*

[2013] FCCA 1421

Catchwords:

MIGRATION – Application for skilled visa – Migration Review Tribunal decision – judicial review – failure to comply with invitation letter – finding of fact – whether jurisdictional error established.

Legislation:

Migration Act 1958 (Cth), ss.97, 359, 359A, 359C, 360, 474, 476.
Migration Regulations 1994 (Cth)

Cases cited:

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24
Craig v South Australia (1995) 184 CLR 163
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Hasran v Minister for Immigration & Citizenship & Anor (2010) 183 FCR 413

Applicant:

MANJINDER SINGH

First Respondent:

MINISTER FOR IMMIGRATION,
MULTICULTURAL AFFAIRS &
CITIZENSHIP

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File Number:

ADG 166 of 2013

Judgment of:

Judge Brown

Hearing date:

17 September 2013

Date of Last Submission:

17 September 2013

Delivered at:

Adelaide

Delivered on:

24 September 2013

REPRESENTATION

Counsel for the Applicant: In person

Counsel for the Respondents: Ms Johnson

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The name of the first respondent be amended to “Minster for Immigration Multicultural Affairs and Citizenship”.
- (2) The application be dismissed.
- (3) The applicant pay the cost of the first respondent in a fixed sum of \$3,326.00.
- (4)
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT ADELAIDE

ADG 166 of 2013

MANJINDER SINGH

Applicant

And

**MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS
& CITIZENSHIP**

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, Manjinder Singh, seeks to review a decision of the second respondent, the Migration Review Tribunal, made on 6 May 2013.
2. The Tribunal decision affirmed an earlier decision of the delegate of the first respondent, the Minister for Immigration, Multicultural Affairs & Citizenship not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Background

3. The applicant was born on 15 June 1984. He is a citizen of India. He applied for the visa in question (“the skilled visa”) on 6 May 2011.
4. It is a requirement of the skilled visa that the applicant provide evidence that he or she has competent English. In the case of applicants from non-English speaking countries, this is provided in the form of an examination under the *International English Language Testing System* (“IELTS”).
5. With his visa application, Mr Singh provided a copy of results of an IELTS test, undertaken in India, on 27 November 2010, which reported an overall score of 7.0. A photograph of the person, who purportedly took the test in question, is attached to the exam result.¹
6. The applicant is the holder of a passport issued by the Republic of India. The applicant was required to submit a copy of his passport in conjunction with his visa application. The passport contained a photograph, which was purported to be of the applicant himself.
7. In addition, to other primary criteria, the applicant was required to satisfy public interest criteria 4020, contained in clause 485.224(a) of schedule 2 of the *Migration Regulations 1994* (the Regulations).
8. PIC 4020 provides as follows:

“(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.”
9. In essence, the applicable public interest criterion requires that there be no evidence available, to the relevant decision maker concerned, that

¹ See court book at page 39

the visa applicant in question has provided a bogus document or other information that is false or misleading in a material particular.

10. The expression *bogus document* is defined in section 97 of the *Migration Act 1958*. It means a document that the Minister reasonably suspects is a document that:

“(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.”

The delegate’s decision

11. The Minister’s delegate wrote to the applicant on 10 July 2012. In this letter, the delegate referred to the applicant’s IELTS test report form; his passport photograph; and passport bio-page photo.
12. In this context, the delegate asserted he had information available to him, which indicated that these photographs differed from the photograph posted on the on-line IELTS verification system.
13. Accordingly, the delegate wrote to the applicant informing him that he considered that a *bogus document* may have been provided by the applicant in support of his visa application.
14. In this context, the delegate wrote to the applicant in the following terms:

... “You may provide comment on the information that is considered to be non-genuine, and specify if you believe there are any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of PIC 4020 and the grant of a visa”.²

15. The applicant was granted 28 days to provide his comments, as requested.

² See court book at page 58

16. The applicant had retained a migration agent to assist him with the preparation of his application. On 7 August 2012, the applicant's advisor indicated that he was no longer acting for the applicant. The applicant did not otherwise respond to the invitation letter of 10 July 2012.
17. The delegate made her decision on 18 December 2012. She refused the visa application, on the basis that Mr Singh had not met public interest criterion 4020. It was found that the IELTS test report form was a bogus document, which indicated that an imposter was likely to have been involved.
18. In addition, the delegate considered that there were no compelling or compassionate reasons, affecting the interests of an Australian citizen, which dictated any waiver of the applicable criterion being made.

The proceedings before the Tribunal

19. On 4 January 2013, the applicant lodged an application for review to the Migration Review Tribunal. As a consequence of this application, in a letter dated 14 March 2013, the Tribunal wrote to the applicant requesting information from him, pursuant to the provisions of section 359A of the *Migration Act*.
20. This section legislatively codifies the legal principle that a decision making body is required to disclose to a person, who will be affected by its decision, any information which is likely to be adverse to the applicant seeking a decision from it.
21. In this case, the information provided in the letter of 14 March 2013 was as follows:

“The photograph of the candidate on the IELTS test report from you submitted in support of your application for the visa ... is not of the same person who undertook the test on 27 November 2010 in India to which the report relates.”
22. The letter went on to inform the applicant that this information was relevant because, in the absence of evidence to the contrary, the Tribunal was likely to conclude that the applicant had provided a bogus document, in relation to his application for a skilled visa. The

applicant was given until the 22 April 2013 to respond to the invitation letter.

23. The next procedural step, in respect of the review application, was that on 4 April 2013, the Tribunal invited Mr Singh to attend a hearing, which was scheduled for 30 April 2013. It is also the case that the applicant, by telephone, requested an adjournment of the hearing. He was advised to put such request in writing but did not do so.
24. The hearing of 30 April 2013 was cancelled as a consequence of a decision made by the Tribunal on 29 April 2013. This decision was made because the applicant had failed to respond to the invitation letter and therefore the Tribunal decided to determine the matters on the basis of the evidence already extant without any further information being elicited.
25. The Tribunal was authorised to cancel the hearing, by virtue of section 359C of the *Migration Act*, which provides that if a person fails to respond to an information letter, prior to the expiration of the time given for providing the information requested, the Tribunal *may* make a decision on the review, without taking any further action to obtain the information originally sought.
26. In its decision, published on 6 May 2013, the Tribunal found as follows:

“I have examined the photographs of the candidate who undertook the IELTS examination in India provided by the IELTS verification system, and the photograph on the IELTS test report form. I am satisfied that the two photographs are of different people. In the absence of any explanation from the applicant, I am satisfied that this is explained by the use of an imposter at the IELTS test in India, and the fraudulent substitution of a photograph on the IELTS test report form. I find that there is cogent evidence before me that the document is a bogus document as defined by section 97 of the Act, in that it has been altered by a person who does not have authority to do so.”³

27. The Tribunal further found that the bogus document was given to the Department, by the applicant, when he lodged his application for the skilled visa on 1 July 2011.

³ See court book at page 114

28. As such, it was found that the applicant had not met the requirements of public interest criterion 4020. The Tribunal further found that there were no grounds on which the requirements of this condition should be waived in the applicant's case.

The current proceedings

29. The applicant commenced these proceedings on 7 June 2013. The application is in time. The applicant seeks an order that the decision of the Tribunal be quashed. The grounds for his application are as follows:

“My application is refused by immigration and tribunal because they say my English exam is not taken by me. This English exam is called ‘International English Language Testing System, ie ‘IELTS’. Where as I was the person who undertook the exam and cleared it. I appeal to court that I should be granted the visa. The decision made by immigration and tribunal is wrong. I provided them the report card of my exam which has my photo and all other details on it. But they say somebody else appeared in the exam but provided no proof in this regard. Where as when I lodged my application, I provided the copy of the result with my details on it. So, I believe a wrong decision is made and it should be reversed.”

30. In support of his application, Mr Singh has sworn an affidavit, which is in identical terms to his application. As I understand his position, the gravamen of his evidence is that the factual basis on which the Tribunal reached its conclusions is incorrect and he is, in fact, the person who sat the relevant English language proficiency test.
31. The application was originally listed before the court on 9 July 2013. On this occasion, the applicant was given to leave file and serve any amended application and any other material on or before 27 August 2013. The applicant has not availed himself of this opportunity.
32. The applicant appeared, on his own behalf, at the hearing for review of the Migration Review Tribunal decision on 17 September 2013. On this occasion, he was assisted by a Punjabi interpreter and made brief oral submissions to the effect that he had undertaken the test in question and a request to adjourn the hearing of the Tribunal had not been granted.

33. The Minister responded to the application on 19 June 2013. It seeks the dismissal of the application on the basis that it is not the court's function to undertake a review of the merits of the Tribunal's decision.

The legal framework to the court's decision

34. Pursuant to section 476(1) the Federal Circuit Court has "*the same original jurisdiction in relation to migration decisions as the High Court under paragraph 75(v) of the Constitution*".
35. However, this jurisdiction is qualified by section 474 of the Act, which stipulates that a wide variety of decisions made under the Migration Act, which are of an administrative nature are "*privative clause decisions*".
36. The decision, which the applicant seeks to review is such a "*privative clause decision*" as defined by section 474 of the Act. The High Court in *Plaintiff S157/2002 v Commonwealth of Australia*⁴ has held that the provisions of section 474 does not prevent the review of decisions made by the Tribunal, which are affected by jurisdictional error or have been made in bad faith.
37. An Administrative Tribunal exceeds its powers and thus commits a jurisdictional error if it identifies a wrong issue, asks a wrong question, ignores relevant material, relies on irrelevant material or, in some circumstances, makes an erroneous finding or reaches a mistake and conclusion in a way that affects the exercise or purported exercise of the Tribunal's power.⁵

Conclusions

38. The hearing before me is not a merits review. Rather it is a judicial review. I must be careful not to confuse the two. It is the function of this court to determine whether the decision of the Tribunal was within its legal powers.

⁴ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24

⁵ See *Craig v South Australia* (1995) 184 CLR 163

39. It is not its function to examine the merits of the decision.⁶ Accordingly this hearing is not a rehearing of all the available evidence. Rather the hearing is directed towards the legality of the Tribunal's decision.
40. There is no error in the decision of the Tribunal, so far as it concluded that Mr Singh did not satisfy the requirements of public interest criterion 4020, given that it had concluded, from the evidence available to it, that a bogus document had been submitted in support of the visa application concerned.
41. The Tribunal is the sole finder of fact in the case. It alone is empowered to make any necessary evidentiary findings arising from the application of the public interest consideration to the visa application concerned.
42. In my view, there was ample evidence, from which the Tribunal could reasonably conclude that a bogus document had been supplied in connection with the application and that document emanated from the applicant.
43. This court is not empowered to substitute its own view of the evidence potentially available now and determine the issue afresh. As I have indicated, the Tribunal was the fact finder in the case. In my view, its decision cannot be described as being based on irrelevant material or erroneous in any other way.
44. Having found that the relevant condition had not been met, the Tribunal was bound to affirm the delegate's decision. In my view, no discernible legal error has arisen and, as such, there has been no failure in the Tribunal's jurisdiction.
45. In addition, in my finding, there has been no procedural error disclosed by the Tribunal's actions in respect of the invitation letter issued under section 359(2) of the Act.
46. In my view, the letter which was sent on 14 March 2013, complied with the provisions of the section, authorising the Tribunal to invite a person to give information either orally or in writing.

⁶ *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ

47. In particular, the invitation letter sent on 14 March 2013, pursuant to the provisions of section 359(2), complied with the requirements for written invitations set out in section 359(b) in that it:

0 Specified the way the information was to be given, namely in writing;

1 Correctly specified the period in which the information was to be given, namely on or before 22 April 2013.

48. As a consequence of the letter, the Tribunal was authorised to cancel the hearing scheduled for 30 April 2013. As such, there has been no breach of procedure arising from the fact that Mr Singh was not able to attend an oral hearing before the Tribunal, nor that his telephone application to adjourn the proceedings was not granted.

49. In this context, counsel for the Minister referred me to the decision of *Hasran v Minister for Immigration & Citizenship & Anor*,⁷ in which the Full Court dealt with legislative provisions dealing with applicants who failed to comply with invitation letters. The Full Court said as follows:

“Here, the appellant’s failure to respond to the Tribunal’s letter under s 359A had the effect of attracting the cascading operation of ss 359C(2), 360(2)(c) and, critically, s 360(3) which enlivened the application of s 363A.

This was because the appellant was invited by the Tribunal’s letter under s 359A to comment or respond to the information stated in the Tribunal’s letter by 3 August 2009. He did not do so, and accordingly he was a person to whom s 359C(2) applied. The operation of s 360(3) was thereby attracted. The effect of that subsection in the circumstances of this case was that the appellant was not entitled to appear before the Tribunal.

The operation of s 360(3) then attracted the express terms of s 363A, the effect of which was to provide that the Tribunal did not have power to permit the appellant to appear at an oral hearing.”

50. Accordingly, the exercise of the Tribunal’s discretion under section 359(c)(1) of the *Migration Act* was not in all of the circumstances affected by error, jurisdictional or otherwise.

⁷ See *Hasran v Minister for Immigration & Citizenship & Anor* (2010) 183 FCR 413 at 417

51. In these circumstances, it is appropriate that the application be dismissed and it be ordered that Mr Singh pay the first respondent's costs fixed in the sum of \$3,326.00.
52. For all these reasons, the orders of the court will be as set out at the commencement of these reasons for judgment.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Judge Brown

Associate:

Date: 24 September 2013